

IN THE COURT OF APPEALS OF IOWA

No. 3-424 / 13-0309

Filed May 30, 2013

**IN THE INTEREST OF B.M. and P.M.,
Minor Children,**

**C.K., Mother,
Appellant.**

Appeal from the Iowa District Court for Polk County, Rachael E. Seymour,
District Associate Judge.

A mother appeals the termination of her parental rights. **AFFIRMED.**

Lynn C.H. Poschner of Borseth Law Office, Altoona, for appellant.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant
Attorney General, John Sarcone, County Attorney, and Stephanie Brown,
Assistant County Attorney, for appellee.

Jane White, Des Moines, for father.

Nicole Nolan of Youth Law Center, attorney and guardian ad litem for
minor children.

Considered by Doyle, P.J., and Danilson and Mullins, JJ.

MULLINS, J.

The mother appeals from a juvenile court order terminating her parental rights to two children under Iowa Code section 232.116(1)(b), (d), (e), and (f) (2011). The mother contends (1) the State did not make reasonable reunification efforts, (2) the State failed to prove each statutory ground for termination by clear and convincing evidence, (3) terminating her parental rights is not in the children's best interest, (4) placement with the children's father weighs against terminating her parental rights, and (5) the juvenile court erred in excluding certain telephonic testimony. We affirm the order terminating the mother's parental rights.

I. Background Facts and Proceedings

We must review the termination of the mother's parental rights to two children, P.M. (born 2003) and B.M. (born 2000). The mother and father are the parents of P.M., B.M., and R.M. R.M. is now an adult and is not at issue in the present appeal. The parents have a history of domestic abuse and divorced in 2010.

This case first came to the attention of the Department of Human Services (DHS) in November 2009 on a report that the mother had abused the oldest child, R.M. As a result of the reported abuse, DHS provided services to the family including individual therapy for the children and the mother. In August 2010, the mother left a visible injury on B.M. while disciplining him for using the telephone. The abuse occurred in the presence of P.M. B.M. expressed fear about being in the mother's home and was afraid the mother would punish him

for speaking with DHS. Based on this latest episode of physical abuse, the State requested that the juvenile court enter an order temporarily removing the children from the mother's care. The court granted the State's request for temporary removal and placed the children with the father.

In August 2010, the juvenile court held a contested removal hearing. The court found the mother's testimony was evasive, self-contradictory, contradictory to the testimony of others, and lacked credibility. The mother evaded questions about previous reports of founded child abuse, refused to acknowledge that leaving bruises on the children may constitute child abuse, denied ever physically abusing the children, and accused her children of lying to their therapist and service providers. B.M. expressed fear of the mother's anger. Both the children's therapist and the family safety, risk, and permanency (FSRP) service provider testified that the mother's mental health and anger issues placed the children at risk while under the mother's supervision. The juvenile court confirmed removal.

In September 2010, the juvenile court held an uncontested adjudication hearing. The mother had hired new legal counsel to represent her. The juvenile court adjudicated the children as children in need of assistance pursuant to Iowa Code section 232.2(6)(b) and (c)(2) (2009). The FSRP service provider indicated she was unable to work with the mother any longer because her relationship with the mother had deteriorated. A new FSRP service provider was appointed. The juvenile court found placement outside the mother's home was necessary because of "physical abuse by the mother despite approximately seven to eight

months of services to address this issue.” The court ordered the mother to engage in parenting classes, obtain a psychosocial evaluation, and attend individual therapy. The court ordered visitation at DHS discretion and ordered the mother not to use any form of physical discipline with the children.

In October 2010, the juvenile court held an uncontested dispositional hearing. The mother’s psychosocial evaluation found the mother met the diagnostic criteria for obsessive compulsive disorder with narcissistic and histrionic personality traits and dependent personality features.

In March and April 2011, the juvenile court held a contested review hearing and heard arguments on the mother’s motion for additional visitation. The mother failed to attend the second day of the hearing because “it was too difficult.” The mother’s attorney subsequently withdrew her request for additional visitation. The juvenile court found the mother’s testimony was evasive, in direct contradiction to other testimony, and lacked credibility. The juvenile court also found the mother had made “very serious and totally baseless accusations about one the children’s behaviors.” On one occasion, after seeing a photograph of the father with paintball gun posted on the social media site Facebook, the mother frantically called police reporting the father had a gun and requesting a welfare check on the children. The call led to a late night police search of the father’s home and the children feared their father would be arrested. The juvenile court found the “mother’s behavior regarding the children is so disruptive that it is not in their best interest to continue visitation.” The mother asked for financial assistance to appoint a new therapist. The court denied the mother’s request

because she had ceased using her previous therapist. The court found the State had made reasonable efforts to work toward reunification with the mother but those efforts were unsuccessful.

In July 2011, the juvenile court held a permanency hearing. The mother had again hired new legal counsel. The mother failed to appear for the hearing and her attorney indicated she might be willing to consent to terminating her parental rights. The court found the State had made reasonable efforts to reunify the children with the mother and ordered the continued placement of the children in the father's home.

From July through December 2011, the mother had little to no contact with the children and apparently still intended to consent to terminating her parental rights. The children and their therapist discussed the possibility of terminating the mother's parental rights.

In January 2012, the mother moved for visitation, the appointment of a court-appointed special advocate (CASA), and a change in the children's therapist. The court held a permanency review hearing in conjunction with a hearing on the mother's motions. Prior to filing the motion, the mother had started to see another therapist, Dr. Gersh who was in the process of writing a report about the mother. The mother's last contact with the children was in February 2011. The court denied the mother's motion for the appointment of a CASA and a change in the children's therapist. The court ordered that visitation may resume if the children's therapist believed contact was in the children's best interests.

In March 2012, the State filed a petition to terminate the mother's parental rights. The juvenile court held termination of parental rights proceedings on the following dates in 2012: June 11, June 22, August 15, August 17, August 27, September 5, September 21, October 16, and November 6. Dr. Gersh, a clinical psychologist, testified on behalf of the mother. Dr. Gersh testified that the mother's original diagnosis was incorrect and that a diagnosis of Post-Traumatic Stress Disorder (PTSD) as a result of domestic abuse at the hands of the children's father was the appropriate diagnosis. Dr. Gersh had originally recommended that the mother have immediate unsupervised visitation with the children. At the time Dr. Gersh recommended immediate unsupervised visitation, however, he was not aware the children did not want to visit the mother. Upon learning this information, Dr. Gersh retracted his position on visitation and admitted that his recommendation regarding visitation was based on incomplete information.

The mother also offered testimony from a witness claiming to be an expert on a novel medical condition. Both the mother and her witness contacted the media and attempted to have a local reporter present in the courtroom during the witness's testimony. In light of the mother's unsubstantiated accusations against one of her children and in order to protect the children's identity and privacy, the juvenile court closed the termination proceedings to the public. The witness offered testimony about how the mother's symptoms were consistent with an "invisible disability" or "psychic injury" that interferes with the mother's therapeutic progress toward reunification with her children. On cross-examination, the

witness's credentials—including an honorary Ph.D. from an online university—were significantly discredited. The witness did not return for a second day of testimony. The mother offered to have the witness testify via telephone, to which the State, the GAL, and the father all objected. The juvenile court refused to allow telephonic testimony because, as the court explained, there was no way to guarantee the mother's witness was not recording the testimony for personal gain. The State, GAL, and the father then moved to strike the testimony of that witness as she was not available for the completion of cross-examination and there were unresolved credibility issues. The juvenile court granted the motion to strike. The juvenile court then refused to allow another one of the mother's witnesses to testify via telephone because of similar concerns about unauthorized recording and an inability to assess witness credibility on cross-examination.

The children's attorney and guardian ad litem made a professional statement that neither child wanted any contact with the mother, and B.M. actually wanted the court to terminate the mother's parental rights. The children's therapist continued to support the termination of the mother's parental rights. She testified the children expressed fear about the mother's anger. The State, DHS, the children's guardian ad litem, and the children's father all urged the juvenile court to terminate the mother's parental rights.

The court terminated the mother's parental rights under section 232.116(1)(b), (d), (e), and (f). The mother appeals.

II. Standard of Review

We review termination of parental rights de novo. *In re H.S.*, 805 N.W.2d 737, 745 (Iowa 2011). We give non-binding deference to the juvenile court's factual findings, especially when determining the credibility of witnesses. *Id.* On review, the children's best interest is of our utmost concern. *In re C.B.*, 611 N.W.2d 489, 492 (Iowa 2000).

We review evidentiary rulings for abuse of discretion. *Scott v. Dutton-Lainson Co.*, 774 N.W.2d 501, 503 (Iowa 2009).

III. Analysis

A. Reasonable Efforts

The mother argues the State failed to make reasonable reunification efforts because the court denied her request for increased visitation and contends she was provided with inappropriate therapy. The State has a duty to make reasonable efforts to reunify a parent with their child. Iowa Code § 232.102(7), .102(10)(a) (setting forth reasonable efforts). We recognize, however, that “the reasonable efforts requirement is not viewed as a strict substantive requirement of termination.” *C.B.*, 611 N.W.2d at 493. Rather, “the scope of the efforts by the DHS to reunify parent and child after removal impacts the burden of proving those elements of termination which require reunification efforts.” *Id.* As part of its ultimate proof that the child cannot safely return to the care of a parent, the State must demonstrate that it made reasonable reunification efforts and it is within this context that we must focus our review. *See id.* We address each of the mother's arguments in turn.

First, the issue of visitation cannot be considered in a vacuum, devoid of any context. See *In re M.B.*, 553 N.W.2d 343, 345 (Iowa Ct. App. 1996). Visitation “is only one element in what is often a comprehensive, interdependent approach to reunification.” *Id.* Here, the mother physically abused the children. Both children at issue expressed fear of the mother’s anger, and B.M. wanted the mother’s parental rights terminated. After the mother made serious and completely unsubstantiated criminal accusations against her oldest child on one occasion and frantically called the police to conduct a late-night search of the father’s home on another occasion, the juvenile court found the “mother’s behavior regarding the children is so disruptive that it is not in their best interest to continue visitation.” The court later allowed visitation to continue to the extent the children’s therapist found it was in their best interest. We find this approach to visitation reasonable under the circumstances.

Second, the mother argues her therapy was not appropriate for her diagnosis of PTSD. While the State has an obligation to provide reasonable reunification services, “the parent has an equal obligation to demand other, different, or additional services prior to a permanency or termination hearing” to give the State an opportunity to provide those service. *In re A.A.G.*, 708 N.W.2d 85, 91 (Iowa Ct. App. 2005). If the parent does not request other, different, or additional services prior to termination, we may consider the issue waived. See *id.* Here, the mother did not raise the issue of inappropriate therapy with the juvenile court prior to the termination hearing. Thus, we find this issue waived. See *id.*

B. Statutory Grounds

The mother challenges all four statutory grounds for termination. When a juvenile court order terminates parental rights on more than one statutory ground, we need only find one ground proper to affirm. *In re D.W.*, 791 N.W.2d 703, 707 (Iowa 2010).

To terminate parental rights under section 232.116(1)(f), the State must show the child is four years or older, has been adjudicated in need of assistance, has been removed from the home for a requisite period of time, and the juvenile court could not return the child to the parent's custody pursuant to section 232.102. See Iowa Code § 232.116(1)(f) (setting forth the statutory requirements for termination). It is undisputed that the children are four years or older, have been adjudicated in need of assistance, and were removed from the mother's home for the requisite period of time under section 232.116(1)(f)(1), (2), and (3). Thus, our review focuses on whether the State proved grounds for termination under section 232.116(1)(f)(4) by clear and convincing evidence.

To determine whether the State met its burden to prove statutory grounds for termination under section 232.116(1)(f)(4), we must consider whether the State presented clear and convincing evidence the children are imminently likely to suffer an adjudicatory harm upon their return to the parent's care. See *id.* §§ 232.116(1)(f)(4), .102(5)(a)(2), and .2(6)(c); *In re A.M.S.*, 419 N.W.2d 723, 725 (Iowa 1988). The mother refuses to accept responsibility for physically abusing her children. It is clear the mother still suffers from unresolved mental health issues despite years of services designed to address those concerns. The

children's therapist, the DHS worker, and the FSRP service provider all expressed serious concerns about the mother's ability to provide safe and appropriate care for her children. Upon our de novo review of the record, we find clear and convincing evidence the children are imminently likely to suffer an adjudicatory harm upon their return to the mother's care. Thus, we find the State met its burden to prove statutory grounds for termination under section 232.116(1)(f). As a result, we need not reach the question of whether termination is proper under any other statutory ground. *D.W.*, 791 N.W.2d at 707.

C. Best Interests

To determine whether terminating parental rights is in a child's best interests, we "give primary consideration to the child's safety, to the best placement for furthering the long-term nurturing and growth of the child, and to the physical, mental, and emotional condition and needs of the child." *In re P.L.*, 778 N.W.2d 33, 39 (Iowa 2010) (quoting Iowa Code § 232.116(2)). In this case, it is clear that the mother's physical abuse of the children caused lasting physical, mental, and emotional damage. At times both children expressed fear about being left in the mother's care. The DHS worker, the FSRP worker, and the children's therapist repeatedly asserted that it is not in the children's best interests to return to the mother's care. The mother's history of physically abusing the children coupled with unresolved mental health issues hampers the type of long-term nurturing and growth these children deserve. Thus, we find it is not in the children's best interests to return to the mother's care. *See id.*

D. Statutory Exceptions—Relative Placement

The juvenile court is not obligated to terminate parental rights when “[a] relative has legal custody of the child.” Iowa Code § 232.116(3)(a). But this exception to termination is permissive, not mandatory. See *P.L.*, 778 N.W.2d at 39. Based on the unique circumstances of each case and the best interests of the child, the court may exercise its discretion in deciding whether to apply this factor to save the parent-child relationship. See *id.*

The children are in the father’s legal custody. The mother and father have a long, troubled history together. Given the circumstances of this case, the fact that the children are in the father’s legal custody does not favor saving what, if anything, is left of the parent-child relationship. We find no error in the juvenile court’s refusal to apply the statutory exception to termination under section 232.116(3)(a) to B.M. and P.M. in this case.

E. Telephone Testimony

The mother argues the juvenile court erred refusing to allow certain witnesses to testify via telephone. The mother correctly notes that “[t]here is no rule or statutory provision . . . that would allow witnesses to testify telephonically in equitable proceedings.” *In re Estate of Rutter*, 633 N.W.2d 740, 746 (Iowa 2001). In the absence of agreement by the parties, we find no abuse of discretion in refusing to allow an out-of-court witness to testify by telephone.

The mother also argues that the juvenile court erred in striking the testimony of the witness who had testified in person on direct examination but whose cross-examination was not complete.

The purpose of cross-examination is to test the veracity of statements a witness made and to weaken or disprove the opposing case. 98 C.J.S. *Witnesses* § 447, at 422 (2002). Opposing counsel is free to cross-examine an expert witness and challenge the strength of his or her testimony. See, e.g., *Olson v. Nieman's, Ltd.*, 579 N.W.2d 299, 309 (Iowa 1998) (opposing counsel may question expert on some flawed assumptions in testifying going to the weight of the experts opinion).

Heinz v. Heinz, 653 N.W.2d 334, 342 (Iowa 2002). Iowa has long recognized a general rule that “the direct examination should be excluded where there is not adequate opportunity for cross-examination.” *Nehring v. Smith*, 49 N.W.2d 831, 834 (1951); see also 98 C.J.S. *Witnesses* § 512 (2013). We find no abuse of the juvenile court’s discretion when it sustained the motion to strike offered by the State, GAL, and the father, which had asserted that without completing cross-examination they were not able to fully develop challenges to the credibility of the witness.

AFFIRMED.